BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RAYMOND MILLER	)	
Claimant	)	
	)	
VS.	)	
	)	
WILLIAMS MACHINE TOOL COMPANY	)	
Respondent	)	Docket No. 1,023,089
	)	
AND	)	
	)	
HARTFORD UNDERWRITERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the August 17, 2006, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on November 15, 2006.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for the claimant. J. Sean Dumm, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, during oral argument to the Board the parties agreed that if the Board finds that claimant suffered personal injury by accident arising out of and in the course of his employment with respondent, then the Board should decide the remaining issues not reached by the Administrative Law Judge (ALJ), including the nature and extent of claimant's disability. The parties also agreed to the ALJ's finding of an average weekly wage of $470.

ISSUES

The ALJ found that claimant failed to prove by a preponderance of credible evidence that his injuries arose out of and in the course of his employment with respondent. Accordingly, claimant was not awarded workers compensation benefits.

Claimant requests review of the ALJ's finding that he did not prove that his injuries arose out of and in the course of his employment with respondent. Claimant asks the Board to enter an order allowing workers compensation benefits and to determine the nature and extent of his disability and award payment of past and future medical expenses, temporary total disability from the date of accident until claimant returned to gainful employment on March 23, 2006, and for such other relief as the Board deems reasonable.

Respondent contends that claimant did not meet his burden of showing that his injuries arose out of and in the course of his employment and requests that the ALJ's Award be affirmed in that regard. Respondent disputes, however, that claimant gave respondent timely notice of accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working for respondent in August 2004 as an end grinder. He testified he worked ten hours a day and worked five and sometimes six days a week. Claimant described his job tasks, stating he picked up the pans from a cart about one foot off the ground, put the pan on a dolly, moved it to his area, and then lifted it off the dolly onto a table. The top of the table would be about three and one/half to four feet above the floor. The pans of parts weighed 50 pounds or more. There would be from 10 to 360 parts in a pan. Claimant said he lifted from two to eight pans a day. If a coworker was available, claimant would have help moving the pan.

When grinding parts, claimant would pick up a part with either one hand or both hands. He would hold the part in front of him, put it in the grinder, and lock the part in place. He would then move some handles to grind the part to the right specifications. With his left hand, he would be moving a vibrating wheel that was connected to the grinder. He would hold his left hand out in front of him in an outreached position about a foot in front of him. His right hand would operate a lever that would move the grinding wheel in or out. He would push or pull on this lever, which also vibrated. His right hand would be out about belt level. When the part was ground, he would reach out about chest level, unlock the part, pull it out, and put another part into the grinder. The finished part would be placed on a tray.

Claimant said that it took two hands to get the parts in and out of the machine, one hand to lift the mechanism to get into the machine and the other hand to grab the part. The parts were small, some being only three inches long and weighing a few ounces. The biggest part would weigh a pound and would be four to five inches long. Claimant said he was constantly working with his hands in an outreached position at waist level operating a grinder. While performing these job duties, he developed pain in his shoulders and neck. The pain started in his right arm and then moved to his left. When he started having pain in his right arm, he started using his left more, causing more problems with the left. He said he reported these problems to Steve Smith, his supervisor, in February 2005.

Mr. Smith testified that employees can ask for help lifting the 50-pound pans from the carts and that only about five percent of the time would an employee have to lift them alone. Mr. Smith also said the individual parts in the pans weigh up to no more than one or two pounds apiece.

Claimant testified that he had pain in his right shoulder when he went to work on April 18, 2005. As he worked, the pain worsened and he had pain in his left shoulder and his neck. He reported to Mr. Smith that his shoulder was sore and he needed to go to the hospital. He left work at 7:30 a.m. and went to Freeman Hospital. The medical records from the hospital show that claimant reported no known injury but stated that his job required him to do a lot of heavy lifting. Claimant was prescribed medication and was taken off work for two days. The emergency room doctor told him to see his family doctor, and he saw Dr. Ryan Hall three times. Dr. Hall prescribed medication and physical therapy. Claimant has not received the physical therapy because he could not afford it. He has seen no other doctors for his problem, other than being examined by Dr. Edward Prostic.

Mr. Smith testified claimant came to him on April 18, 2005, and said his shoulder had been bothering him for a couple of months and that the night before he had been working on his wife's car, which aggravated the shoulder pain. Claimant said he needed to go to the hospital to have it checked out. Mr. Smith allowed him to leave to go to the hospital but did not direct him to go to the hospital. Mr. Smith did not inquire if the problem was work related. He did not know claimant was making a work related claim until the day after claimant was terminated.

Claimant admitted replacing a fuel pump in his wife's car that involved dropping the fuel tank but said he did very little lifting and used a jack. He said that he did this in April 2005, about a week before he left work on April 18.

Claimant returned to work on April 19 with a doctor's slip to be off for two days. He told Mr. Smith he had tendinitis. Claimant returned to work on Thursday and Friday of that week and then called in sick the next Monday, claiming an adverse reaction to his medication. When claimant came to work the next Tuesday, he was terminated for excessive absences. Claimant had previously been given verbal warnings and at least two

written warnings about excessive absences, and respondent had suspended him for three days for excessive absences in March 2005. When claimant was absent on Monday, April 25, 2005, Mr. Smith and respondent's plant manager decided to terminate him. Both Mr. Smith and the plant manager testified that they did not know claimant was going to claim a work-related injury until after he was terminated.

Since March 23, 2006, claimant has been working at C & N Corporation (C & N) where he is an operator. Claimant said this job involves only a minimal amount of physical work, because he has a helper. Nevertheless, he was required to do some shoveling, which he would do about every two hours. He admitted the work bothers his shoulders and neck a little bit, but it has not caused any permanent worsening. He said he mostly walks around and makes sure the conveyor belts are turning and everything is running.

Timothy Dewer was a coworker of claimant at C & N. He now works for respondent. While at C & N, his job position was a plant operator, the same job position now held by claimant. He testified that in that job, he had to do a lot of shoveling, walking, and climbing over piles. However, he acknowledged that unlike claimant, he was not given a helper. The material being shoveled are granules bigger than sand. A shovelful of this substance would weigh about 20 pounds. Mr. Dewer also said as a plant operator, he had to repair belts or replace pedestals on grinders. A pedestal weighed from 300 to 400 pounds. Mr. Dewer said the position as a plant operator required him to do a lot of pushing and pulling. He admitted that some of the plant operators have helpers, and the helper would do the manual labor.

Claimant was examined by Dr. Edward Prostic on June 7, 2005, at the request of his attorney. Dr. Prostic took a history from claimant wherein claimant stated that he was repetitiously lifting trays of parts to grind them and progressively became more sore in the right upper arm, and then the left upper arm. Claimant complained of pain in the shoulders and inability to sleep on his right side. He complained of headaches when looking up or down and when turning his head to either side. He complained of difficulty raising his right arm, clicking and popping, and numbness traveling down the right arm toward the wrist.

After examination of claimant, Dr. Prostic opined that claimant had sustained repetitious minor trauma and diagnosed him with rotator cuff tendinitis of both shoulders and restricted motion of his cervical spine with radicular symptoms. Dr. Prostic stated that claimant would need treatment to both shoulders in the form of steroid injections, anti-inflammatory medication, and therapeutic exercises. He stated that claimant was capable of only light duty employment, and his hands should be at mid chest height or below.

In a letter dated January 13, 2006, Dr. Prostic rated claimant as having a 10 percent permanent partial impairment of the body as a whole for his cervical spine, a 20 percent permanent partial impairment of the right upper extremity, and a 10 percent permanent partial impairment of the left upper extremity, for an overall impairment of 26 percent to the

body as a whole on a functional basis. He based this rating on the AMA *Guides*.[1] Dr. Prostic opined that claimant's problems were caused or contributed to by the work he performed at respondent.

Dr. Prostic agreed that lifting heavy trays two to eight times a day during an eight to ten hour shift would not be considered repetitive activity. He had no recollection of what claimant told him about his activities working the grinder. However, he said that use of a grinding machine would be a repetitive activity because claimant would repetitively put parts into the machine to grind them. He further stated:

> As I understand it, he was operating at the bottom of what we consider the impingement arc of the shoulder. Generally, impingement starts to occur at 60 to 70 degrees of forward flexion, and my understanding is that his humerus was in about that degree of inflection from his body when he was grinding the parts.[2]

Dr. Prostic has not seen claimant since June 7, 2005. Dr. Prostic admitted that the act of shoveling would affect both claimant's right and left shoulders. He also stated that a task involving pushing and pulling of 300- to 400-pound belts on a machine could continue the symptomatology of the patient.

The ALJ found:

> At his deposition, Dr. Prostic acknowledged that the claimant did not engage in repetitious lifting of trays, but instead attributed the claimant's injuries to repetitiously putting parts in the grinding machine. Dr. Prostic understood that the claimant's grinding task caused him to hold his elbows at nipple height with the elbows forward of the body. This understanding does not conform to the claimant's testimony that he worked with his hands a foot in front of his body at belt height. In such a position, the claimant's elbows would be by his sides. Elbows at nipple height, forward of the body, would occur if the claimant worked with his hands substantially higher than belt height, or considerably farther than one foot away from his body. Dr. Prostic assumed the claimant worked with an impinging degree of forward shoulder flexion, but that was not the case.
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> . . . Steve Smith testified that the claimant reported aggravating his shoulder from a non-work activity. The claimant failed to prove by a preponderance of credible evidence that his neck or shoulders were injured arising out of and in the course of employment.[3]

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[2] Prostic Depo. at 18.

[3] ALJ Award (Aug. 17, 2006) at 3-4.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[6]

Judge Hursh denied claimant's request for preliminary benefits, in part because "[l]ifting four times a day is not what one would ordinarily consider a repetitive task."[7] He, therefore, discounted Dr. Prostic's opinion that claimant was injured as a result of repetitive traumas at work. That preliminary hearing Order was appealed to the Board and affirmed.[8]

> The medical evidence relating claimant's injury to his work is obviously based upon the history given by claimant. As noted by the ALJ, claimant's history of repetitive lifting and frequent heavy lifting at work is not supported by the lay witness testimony of individuals familiar with claimant's job, including claimant himself. Claimant points primarily to lifting the pans of parts as the offending activity. But by his own admission, he only performed this task about four times a day. That is not a repetitive task. In addition, his supervisor not only disputed that claimant would frequently lift pans weighing 50 pounds, he also pointed out that claimant usually had help or could have asked for help with the lifting. Claimant's counsel, in his brief, argues that even if lifting the full pans of parts was not repetitive, claimant would also lift the individual parts from the pan to do the grinding and that this was repetitive. Unfortunately, this was not the activity that claimant pointed to as causing his symptoms either to the physicians or during his testimony at the preliminary hearing. The Board agrees with the ALJ that the record, as it currently exists, fails to satisfy claimant's burden of proof as to the cause of his shoulder condition.[9]

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[4] K.S.A. 44-501(a) (Furse 2000).

[5] K.S.A. 2004 Supp. 44-508(g).

[6] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[7] ALJ Order (Aug. 17, 2005) at 1.

[8] Appeals from preliminary hearing orders are decided by a single Board member.

[9] *Miller v. Williams Machine Tool Company*, No. 1,023,089, 2005 WL 3408007 (Kan. WCAB Nov. 17, 2005).

Initially, the claimant went to his supervisor and indicated that he needed medical treatment for his shoulder because the night before he had aggravated his shoulder working on his wife's car. Claimant obtained treatment but it was after he was terminated for excessive absences that he alleged a work-related accident.

At preliminary hearing the claimant alleged injury to his shoulder due to repetitively lifting trays at work. That theory of causation for his injury proved unsuccessful before the Administrative Law Judge and the Board because the evidence established claimant did not repetitively lift the heavy trays. Consequently, at regular hearing claimant changed his theory of causation for his injury to repetitively lifting individual parts for grinding.

Dr. Prostic noted that in order to injure his shoulders, claimant would have to repetitively extend his arms in a manner that would put his shoulder within the impingement arc. But claimant testified that he worked with his hands a foot in front of his body at belt height.

The claimant's credibility is further diminished by the testimony of a coworker at claimant's new job. Although claimant testified he did little physical work at his new job, the coworker testified the job required a lot of shoveling.

In summation, the claimant's credibility is suspect because he initially noted injury at home working on his car, he then alleged a work-related injury after being terminated from employment, he changed his theory of causation for his injuries after being denied compensation at the preliminary hearing and the manner he performed his work would not put his shoulders within the impingement arc in order to injure his shoulders.

Accordingly, the Board affirms the determination of the ALJ that the claimant failed to meet his burden of proof that his shoulder injuries arose out of and in the course of his employment with respondent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 17, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

We respectfully dissent from the majority's determination that claimant's injury did not arise out of or occur in the course of his employment with respondent.

Dr. Prostic was the only medical expert called to testify in this case. In that regard, Dr. Prostic's expert medical opinion on causation is uncontradicted. Generally, uncontradicted evidence is considered conclusive if not improbable or unreliable.[10] Granted, there initially were questions concerning Dr. Prostic's opinion. The history Dr. Prostic recorded was that claimant "was repetitiously lifting trays of parts to grind them. He became progressively more sore first about the right upper arm, then the left."[11] This history was inconsistent with the claimant's preliminary hearing testimony because claimant did not repetitiously lift trays. But it is consistent with the facts as they were eventually developed. Clearly, claimant did repetitiously lift parts from the trays to grind them.

At the May 9, 2006, Regular Hearing, claimant further explained his job duties with respondent and clarified his preliminary hearing testimony to describe the offending activities as including the lifting and the grinding of the individual parts rather than just the lifting of the trays full of parts. That is to say, instead of focusing on the heavy lifting, claimant described the totality of his work activities and related his symptoms to all of those activities. And after reviewing claimant's Regular Hearing testimony, Dr. Prostic did

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[10] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, Syl. ¶ 2, 558 P.2d 146 (1976);*Overstreet v. Mid-West Conveyor Co., Inc.*, 26 Kan. App. 2d 586, 589, 994 P.2d 639 (1999).

[11] Prostic Depo., Ex. 1 at 1.

likewise. Ultimately, Dr. Prostic opined "that the difficulties that I diagnosed were caused or contributed to by the work that [claimant] performed at [respondent] through April 22nd, 2005."[12] This opinion is uncontroverted and should be adopted. Furthermore, Dr. Prostic related claimant's permanent impairment to his work activities with respondent.

> Q. [By claimant's attorney] Doctor, did you formulate an opinion at that time whether or not [claimant] had sustained any permanent partial impairment as a result of his work injury with [respondent] each and every working day through April 22nd, 2005?
>
> A. Yes.
>
> Q. What is that opinion?
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> . . . .
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> A. It is my opinion that the patient has 10 percent permanent partial impairment of the body as a whole for his cervical spine, 20 percent for his right upper extremity, and 10 percent for his left upper extremity, which combines to 26 percent of the body as a whole on a functional basis.
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> Q. (By [claimant's attorney)] Doctor, is that based upon the AMA Guidelines, Fourth Edition?
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> A. Yes.[13]

Dr. Prostic did not examine claimant again after his initial examination on June 7, 2005, and, therefore, his impairment rating was of claimant's condition on that date. Accordingly, claimant's subsequent work activities at C & N were not a factor in Dr. Prostic's rating.

The question becomes whether Dr. Prostic's understanding of claimant's job duties with respondent was so flawed as to render his causation opinion untrustworthy. The majority apparently thinks so, but we disagree. When Dr. Prostic testified, he not only had the history given to him by claimant at the time of his examination, but also claimant's preliminary hearing and regular hearing testimonies. And claimant's description of his job tasks upon which Dr. Prostic relied was not dramatically different from that given by his supervisor, Mr. Smith. In the absence of an expert medical opinion to the contrary, the undersigned Board Members accept the causation opinion given by Dr. Prostic. Likewise, Dr. Prostic was the only physician to give an opinion as to claimant's permanent impairment. Accordingly, the Board should adopt Dr. Prostic's rating of 26 percent to the body as a whole. We would also adopt the ALJ's conclusion that notice of accident was timely given to respondent by claimant. However, we would find that claimant failed to

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[12] Prostic Depo. at 9-10.

[13] *Id.* at 11-12.

prove that he was temporarily totally disabled from engaging in substantial, gainful employment. Accordingly, temporary total disability compensation should be denied.

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
J. Sean Dumm, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge